

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MILO LORENZO FITZPATRICK,

Defendant-Appellant.

UNPUBLISHED

August 19, 2003

No. 236187

Calhoun Circuit Court

LC No. 00-004741-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN DARELLE WITCHER,

Defendant-Appellant.

No. 236188

Calhoun Circuit Court

LC No. 00-004624-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

MURRAY, J. (*concurring in part/dissenting in part*).

I fully concur in the majority's opinion except with respect to part II (E) regarding the majority's decision to remand this case for resentencing before a different judge. As the majority opinion makes brief reference to, the trial court recognized that in giving defendant a sentence that exceeded the statutory guidelines, it must set forth on the record a substantial and compelling reasons which is both objective and verifiable. MCL 769.34(3); *People v Babcock*, __ Mich __; __ NW2d __ (Dkt. No. 121310, issued 7/31/03), slip op at 12. The trial court explicitly did so during the course of rendering its sentence. Indeed, the court set forth several objective, verifiable, and compelling reasons for exceeding the guidelines on defendant's assault with intent to murder convictions. Specifically, the court indicated that its reasons for exceeding the guidelines were defendants' complete failure to correct his behavior after his numerous prior convictions and incarcerations, and the nature of the offense, i.e., that the assaults occurred while defendant was lying in ambush and his use of lethal force against police officers. After setting forth in detail these reasons, the court ruled as follows:

So, for the record, I am going to indicate that in your case I am going to exceed the guideline sentence range for what I feel are substantial and compelling reasons on two of the counts of assault with intent to commit murder as recommended by the probation department.

It is only *after* the court concluded that it was going to exceed the guidelines that it indicated to defendant that “this has some significance for you.” In discussing the significance to defendant of the court’s decision to exceed the guidelines, the court discussed its view that a sentence for a term of years could cause defendant to be eligible for parole at a time later than he would be had he been given a life sentence. Although the court did indicate that it took that fact “into consideration in the case, very much so,” in context, the court was not indicating that that was a reason for its departure from the guidelines. The reasons for the departure, i.e., the length of the term, were the substantial and compelling reasons previously articulated by the court. As such, I would affirm the trial court’s sentence in this case.¹

Moreover, even if I agreed with the majority that a remand was necessary, remand to a different judge for resentencing is not necessary. In *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), we set forth a three-part test for determining whether resentencing should occur before a different judge. The majority opines that a different judge should resentence defendant “to preserve the appearance of justice,” but the reason for resentencing was because of a mistake of law, i.e., the majority’s conclusion that the trial court improperly took into consideration the time defendant would become eligible for parole. In *Hill*, however, we indicated that resentencing should not occur before a different judge when the trial court’s errors involve questions of law and there is no indication that the original trial judge would have substantial difficulty in setting aside his previously expressed views. *Hill, supra* at 398. In this case, the majority has affirmed the trial court’s finding of objective, verifiable, and compelling reasons for departure and only disagreed on a statement of law made by the trial court. There is nothing in the record to suggest that the trial court judge, who presided over this case and, thus, is aware of the facts of these crimes, could not set aside his view on parole eligibility in resentencing defendant. Hence, I would conclude that if resentencing was required, it should be done by the same judge. *Id.*

/s/ Christopher M. Murray

¹ As the majority correctly notes, even if the trial court had taken the parole eligibility issue into consideration, it was harmless error. *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003). This is so because the trial court properly set forth substantial and compelling reasons for the departure which, independent of any other reason articulated by the trial court, warrant the sentence imposed. *Babcock, supra*.